No. 93-842

In The 4

Supreme Court, U.S.
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SUPREME COURT of the UNITED STATES

October Term, 1993

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition for Writ of Certiorari to the Court Of Appeal, State of California

OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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Respondents, City of Culver City, City Council of the City of Culver City, Steven Gourley, Jozelle Smith, James Boulgarides, Paul A. Jacobs, (hereinafter the "City") respectfully request this Court deny the Pacific Legal Foundation's Motion for Leave to File a Brief *Amicus Curiae* (hereinafter, the "motion")in support of the

Petition for Writ of Certiorari filed in this case.

STATEMENT OF OBJECTIONS

The City will not reiterate points made in its Opposition to the Petition for Writ of Certiorari (hereinafter, the "petition"). Pursuant to Supreme Court Rules 21 and 37[1], the City objects to the motion for four reasons. First, pursuant to Supreme Court Rule 37.2, the motion is not favored. Second, the motion includes misstatements of fact and law. Third, the motion does not raise any issues nor present any information not already presented by the petitioner. Fourth, the motion contains inappropriate disrespectful language which should not be condoned by the Court.

A. The Motion is Not Favored.

As Pacific Legal Foundation (hereinafter, "PLF") correctly notes, pursuant to Supreme Court Rule 37.2, the City refused consent for the filing of a brief *amicus curiae* by PLF. Such request was denied for two reasons. First, PLF requested and was granted leave to file a brief *amicus curiae* in the Court of Appeal. Such brief did not add any new arguments or information germane to the issues in this case. In addition, in its brief *amicus curiae* in the lower court, PLF made inflammatory and irrelevant references to "scandals involving the National Endowment for the Arts". Based on the authority

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[1] Respondents' Objection to the motion is timely pursuant to Supreme Court Rule 21.4. Respondents received the motion on December 27, 1993.

granted to the City, pursuant to Supreme Rule 37.2 and the City's previous experience with PLF, the City could not agree to subject this Court and itself to the same potential indignities suffered by and in the lower courts.

This Court has established its own rules regarding the subject motion at this stage in the proceedings. "A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored." Supreme Court Rule 37.2. As shown below, the Court will be best served, at this juncture, if the above noted Rule is enforced.

B. Misstatements of Fact and Law.

Similar to the petition, PLF has misstated several important facts in order to persuade the Court of the need for intervention. Throughout the papers filed by PLF, the purpose of the mitigation fee is mischaracterized. In addition, PLF continually argues the fee must be related to impacts caused by the construction of the townhome project.[2]

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[2] In its motion (Mot. at iii), PLF asserts the mitigation fee was to alleviate the impact of the "loss of private tennis courts". In its brief amicus curiae (Brief at 2) PLF again asserts the mitigation fee was imposed "to make up for the loss of public recreational opportunities represented by the demolished private facilities [emphasis added]". Next, PLF asserts the fee "bears no discernible relationship to an impact created by the building project". Brief at 3. Finally, PLF argues, "[T]here is simply no serious connection between [petitioner's] construction of condominiums and a need for ... public tennis courts" (Brief at 6); and "[n]or can it be seriously argued that the permit could be denied because of

In actuality, the mitigation fee was imposed for the sole purpose identified by the Court of Appeal in its reference to the City's findings. "This fee will be used to pay for the replacement of community recreational facilities which are currently provided for by the land use permitted on the subject site, which will be removed pursuant to this approval." Emphasis added; App. 8-9[3]. The clear purpose of the fee was to mitigate the community's lost opportunity to have recreational facilities developed and properly maintained and operated on the subject site. Such loss derived directly from the approval of the land use change which permitted the construction of the deluxe townhome project. App. 15.

Pursuant to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), an exaction passes constitutional muster if it addresses the same governmental interest which would be advanced by an outright denial of the development project upon which the exaction is imposed. Again as noted by the Court of Appeal, the close nexus between the mitigation fee and the interests served by denial of the land use change is evident. "The imposition of the $280,000 fee was imposed for the express purpose of mitigating the effect of the loss of land restricted to community recreational use which would result from approval of the developer's project." Emphasis added; App. 14.

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the loss to the community of demolished private tennis courts" (Brief at 7).

[3] As with the City's Opposition to the petition, references to any appendix to the petition shall be noted as App. __.

PLF goes to great lengths to advocate *Nollan* has established a "bright-line test" of heightened scrutiny. Brief at 7. However, even this Court applied the "reasonably related" test when it determined the condition requiring public access across beach front property did not substantially advance the legitimate state interest in lowering the "psychological barrier" to access to the beach. *Nollan*, *supra*, at 838. After applying the reasonably related standard, the Court cited several cases (a few of which are identified below) which also upheld applications of the less strict levels of scrutiny. *Longboat Key v. Lands End, Ltd.*, 433 So.2d 574 (Fla. App. 1983) (applied a "rational nexus" test); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972), *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78 (1966) and *Jordan v. Menomonee Falls*, 28 Wis.2d 608 (1965) (all applied a "reasonable relation" test).

Justice Scalia also declared, if a condition requires the conveyance of land, a heightened scrutiny will be used to determine whether the legitimate state interest really is being substantially advanced.

> As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Nollan, at 841. Thus, even *Nollan* recognizes a lesser standard is appropriate when a monetary exaction is involved.

PLF asserts an "'essential nexus' between the fee and the [petitioner's] project [is] required by *Nollan*, 483 U.S. at 837." Brief at 6. However, PLF failed to explain what the "essential nexus" test discussed in *Nollan* really is. In fact, it creates a standard which seems to be even less stringent than the "reasonable relation" test. The essential nexus referred to by Justice Scalia is the complete failure of a condition to serve the same legitimate goal as would an outright denial.

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as justification for the prohibition. When that essential nexus is eliminated, [the constitutionality of the condition is forfeited].

Nollan, at 837. As stated earlier, the Court of Appeal and the City's findings show there is no utter failure in the connection between the mitigation fee and the outright denial of the requested land use changes.

With regard to the Art in Public Places Program, PLF again misrepresents the facts. PLF insinuates the City's City Council has unfettered authority to disapprove art proposed by a developer to satisfy the Art in Public Places Program. Mot. at iii; Brief at 18. In fact, the City's planning commission, on recommendation of the city's arts committee, has authority only to determine whether the artwork is compatible with the aesthetics of the development itself. The City Council would review the

matter only on appeal. Culver City Municipal Code § 33H-27; App. 85-86. The limited nature of the review process established by the City's Art in Public Places Program does not violate anyone's rights to free speech or association.[4]

C. No New Issues Are Raised by PLF.

The brief filed by PLF covers little new ground, and in the interest of judicial economy, this objection will not repeat arguments previously made by the City. However, since PLF has cited cases not previously cited by petitioner in the attack on the mitigation fee as well as reiterated several mischaracterizations of the fee, the City submits this short reply to these issues.

PLF has fabricated a "straw man" argument to challenge the validity of the mitigation fee. PLF then uses quotations from diverse and archaic cases to knock this straw man down.

Specifically, PLF argues, if the City had denied the requested land use change, then it somehow

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[4] It is interesting to note, petitioner never raised any objection to the City's authority to review art work which, under the art program, could be proposed for the project site. During the pendency of the case below, petitioner had decided to pay the in lieu fee, rather than place the art on the property. The challenge below was to the constitutionality of the in lieu art fee not the placement of art on-site. As noted by the Court of Appeal, "The developer does not argue that such rights of approval violate his first amendment rights. If the developer elects to pay a fee instead of choosing the art, the developer may not then complain that his first amendment right to freedom of speech has been violated." App. 29.

would have been "requiring [petitioner] to stay in the health club business against his will." Brief at 17. Having set up this erroneous premise, PLF cites to the authority discussed below for the proposition the City cannot require petitioner to maintain a facility. Since the City cannot require petitioner to maintain a recreational facility, so this flawed logic proceeds, it cannot impose a fee to mitigate the impacts of the change in land use restrictions from recreational uses to residential uses.

This line of argument is completely without merit. As is clearly established by the record and discussed in the City's previously filed brief, the City has not required petitioner to maintain and operate a recreational facility. Rather, petitioner requested the City to change the land use designation of its property from recreational uses to a designation which would permit the condominium project. The mitigation fee was designed to compensate the City for the loss to the community of the recreational opportunities which would have existed but for the granting of the requested land use reclassification. The mitigation fee does not require petitioner "to stay in the health club business".

Thus, the cases cited by PLF simply are not pertinent to the issues before this Court. *Robinson v. Diamond Housing Corporation, 463 F.2d 853 (D.C. Cir. 1972)* involves (at least tangentially) the question of whether a property owner can be forced to stay in business. Since the City has not attempted to force petitioner to stay in the recreation business, this case has no relevance.

Even more curious are the citations by PLF to *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) in support of

its position that the mitigation fee is unconstitutional. In *Allgeyer*, this Court held Louisiana could not penalize one of its citizens for insuring goods located within Louisiana by entering into an insurance contract in New York with an insurance company not authorized to do business in Louisiana. In *Meyer*, the Court held unconstitutional a state statute which made it a criminal offense to teach German to students in public or private schools. It is hard to imagine citations more far afield than these.

Rather than explaining to this Court how these cases are relevant to the issues in this appeal, PLF has taken out of context certain language in its seeming effort to demonstrate the invalidity of zoning ordinances in general. For example, PLF cites a passage in *Allgeyer* which states that the Constitution protects the liberty of every United States citizen to "live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." *Id.* at 589. Brief at 17.

Apparently, PLF believes this right to "pursue any livelihood or avocation" includes the right of a property owner to use its property in any manner it desires. Not only do *Allgeyer* and *Meyer* not support this argument, such an assertion runs completely counter to the long-established principle that the zoning of property is a constitutional exercise of the police power. *See, Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

Clearly, the City has authority to zone various property within its jurisdiction in such a way as to permit only single-family dwellings, golf courses, regional malls or other uses it deems necessary for a balanced community. *Id.* Case law has established that zoning

regulations requiring recreation and open space are legitimate exercises of a city's police power. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal.3d 633 (1971) [cert. denied 404 U.S. 878 (October 1971)]. Further, as long as such restrictive uses advance a legitimate state interest and continue to provide a property owner with a reasonable economic use of its land, a request to change such land use regulations could be denied. *See, Keystone Coal Association v. DeBenedictis*, 480 U.S. 470, 488 (1987).

The record includes facts which clearly show a well-run and designed community recreation facility could be operated for a profit on the subject property. App. 7-8. With this in mind, the City could have refused to grant the requested land use change. Had it done so, the City would have retained for the community the opportunity to have much needed recreational facilities. Instead, the City determined it would grant petitioner's request for a land use change, but only if petitioner partially mitigated the lost opportunity created by the requested change. In this way, the City provided for additional housing and to some degree retained the opportunity for recreational facilities, while still granting petitioner the land use change as requested.

Such a condition no more violates petitioner's right to pursue any livelihood or avocation it wanted than would the denial of the land use change outright. Likewise, the recreational facility designation does not invalidly encumber the property any more than a designation which would only permit the construction of a single-family dwelling, a movie studio, a regional shopping mall or a low- and moderate-income rental housing complex. Therefore, the mitigation fee was a constitutional

exercise of the City's regulatory land use authority.

D. PLF's Disrespectful Language Should Not Be Condoned.

Peppered throughout the motion and its Brief, PLF presents the Court with caustic commentary which shows a disdain for California and Federal Courts and local government.[5] Not only are such remarks inappropriate, but they also do not recognize the care with which the California Legislature, the Court of Appeal and

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[5] "This case involves another egregious violation of federal constitutional rights in the guise of local land use permitting regulations." ... "This condition is an egregious violation of this Court's decision in Nollan." Emphasis added; Mot. at iii. "Lower courts have devised a formula for abuse and obfuscation of this Court's formulation of the law of takings. ..." Emphasis added; Brief at 2. The mitigation fee is "extortionate". Brief at 3. The Court of Appeal decision suffers from an "inherent vice" and contains a "facile conclusion". Brief at 4. "[A]buse of property owners by government regulators at the state and local levels remains endemic in California. Part of the reason may well be the anarchic state of lower court decisions, some of which flatly contradict the precedents of this Court. ... ¶The Ninth Circuit Court of Appeals has been troublesome as well." Emphasis added; Brief at 5. This case involves an even "more egregious example which fails "to meet this Court's and the Ninth Circuit's requirements. The case involves "extortion". The fee is "utterly unrelated to any impact". Emphasis added; Brief at 6. PLF asserts the Court of Appeal acted "bizarrely" when it balanced the benefits to the developer resulting from the land use change against the burden imposed by the mitigation fee. Emphasis added; Brief at 16. "This sort of nonsense cannot be justified by any court. ..." Emphasis added; Brief at 19.

the City have implemented this Court's direction in *Nollan*. As noted in the City's Opposition to the petition (at pages 3-5), the California Legislature has adopted a statutory scheme which all local governments in California must follow before development related fees can be imposed. PLF also ignores the Court of Appeal's express finding that the City's mitigation fee met both the "heightened scrutiny test" set by *Nollan* for conditions requiring conveyances of land and the less stringent "rational relation" test, which *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) [cert. denied _ U.S. ___, 112 Sup.Ct. 1997 (May 1992)] and *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App.4th 164 (1992) [cert. denied __ U.S. __, 113 Sup.Ct. 191 (October 1992)] applied to monetary exactions.[6] Finally, PLF's assertions do not give any weight or recognition to the evidence in the record and the extensive and express findings the City made prior to imposing the mitigation fee and the art program. App. 7-9, 16, 19, 23-25, 80-81.

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[6] Both PLF and petitioner appear to want to reargue the same issues this Court found did not warrant its intervention when it denied the separate writs for certiorari in Commercial Builders and Blue Jeans Equities.

CONCLUSION

For the reasons stated herein, the Court should deny PLF's Motion for Leave to File a Brief *Amicus Curiae*.

Respectfully submitted,
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